United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 10-684**
	)	**Issued: November 1, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Concord, CA, Employer	)	

Appearances:
Brett Blumstein, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2010 appellant filed a timely appeal from a December 14, 2009 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly determined appellant's wage-earning capacity based on the selected position of information clerk.

FACTUAL HISTORY

On December 20, 1989 appellant filed an occupational disease claim alleging a right knee injury causally related to his federal employment as a letter carrier. The Office accepted the claim for a right knee chondromalacia. The record indicates that appellant also had a 1993 claim

for a right arm condition, accepted for right ulnar nerve entrapment.[1] Appellant returned to work in a light-duty position.

In a duty status report (Form CA-17) dated April 16, 2007, Dr. Jerome Bernhoft, an orthopedic surgeon, treated appellant's knee condition. He diagnosed chondromalacia and provided work restrictions. Dr. Bernhoft indicated that appellant was limited to two hours a day of walking, pushing, simple grasping and reaching above shoulder, with frequent breaks for fine manipulation. Appellant stopped working in May 2007 and was referred for vocational rehabilitation services.

In a work capacity evaluation (OWCP-5c) dated April 30, 2008, Dr. Bernhoft provided limitations that included two hours of intermittent reaching and reaching above shoulder. With respect to repetitive movements of the arm and elbow, he stated that appellant should follow "Dr. [Jeffrey] Riopelle, [a family practitioner's], restrictions."

A vocational rehabilitation specialist identified the position of information clerk Department of Labor's (*Dictionary of Occupational Titles,* (DOT) No. 237.367-022). The job classification (Form CA-66) indicated that it was a sedentary position (10 pounds lifting) with "occasional" reaching, handling and fingering.[2] The wages were reported as $400.00 per week and the rehabilitation specialist indicated that the job was reasonably available.

By letter dated March 26, 2009, the Office advised appellant that it proposed to reduce his compensation on the grounds that he had the capacity to earn wages as an information clerk at $400.00 per week. It stated that work restrictions in the April 16, 2007 form report from Dr. Bernhoft were the best representation of appellant's work capacity.

In a decision dated May 21, 2009, the Office reduced appellant's compensation based on a current weekly pay rate of $899.47 for the date-of-injury job and earnings of $400.00 per week. Appellant requested a telephonic hearing with an Office hearing representative, which was held on September 29, 2009. He submitted a September 9, 2009 report from Dr. Riopelle, with results on examination. Dr. Riopelle provided restrictions that included no squatting, kneeling, repetitive grasping, pushing, pulling or fine manipulation, and not repetitive motion greater than 10 minutes. In a report dated October 28, 2009, he stated that appellant had a long history of carpal tunnel syndrome and nerve entrapment. Dr. Riopelle opined that appellant could not perform the information clerk position as the duties required repetitive motion that exacerbated appellant's symptoms. Appellant also submitted information from a Department of Labor handbook regarding the duties of receptionists and information clerks.

By decision dated December 14, 2009, the hearing representative affirmed the reduction of compensation. The hearing representative found the evidence sufficient to establish the selected position as appropriate.

[1] OWCP File No. xxxxxx796.

[2] The form defines "occasional" as up to one third of the time.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.[3]

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect his wage-earning capacity in his disabled condition.[4]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's DOT or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.[5] Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.[6]

With respect to whether the selected position is within the claimant's work restrictions, Office procedures state: "If the medical evidence is not clear and unequivocal, the CE [claims examiner] will seek medical advice from the DMA [district medical adviser], treating physician or second opinion specialist as appropriate."[7] In addition, the Board has held that the Office cannot properly determine appellant's wage-earning capacity without a detailed current description of his condition and ability to perform work.[8]

ANALYSIS

In the present case, the Office found that the selected position of information clerk was medically suitable based on appellant's work restrictions. As noted, unless the evidence is clear and unequivocal, the Office should send the job description to a physician and secure an opinion

[3] *Carla Letcher*, 46 ECAB 452 (1995).

[4] *See Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); *see also* 5 U.S.C. § 8115(a).

[5] *See Dennis D. Owen*, 44 ECAB 475 (1993).

[6] 5 ECAB 376 (1953); *see also* 20 C.F.R. § 10.303.

[7] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8(d) (December 1995).

[8] *See Anthony Pestana*, 39 ECAB 980 (1988); *Samuel J. Russo*, 28 ECAB 43 (1976).

that the position is suitable. The Board finds that the evidence was not clear and unequivocal and the Office failed to follow its procedures.

It is noted that at the time of the March 26, 2009 proposed reduction, the most current report was an OWCP-5c from Dr. Bernhoft dated April 30, 2008. While the Office referred to an earlier duty status report dated April 16, 2007, the OWCP-5c represented a more current medical report. In the April 30, 2008 OWCP-5c report, Dr. Bernhoft limited appellant to two hours per day of reaching. The Form CA-66 job description indicated occasional reaching of up to one third of the day, which therefore would exceed Dr. Bernhoft's restrictions. Moreover, Dr. Bernhoft specifically referred to additional restrictions by Dr. Riopelle for repetitive arm movements. It is not clear what current restrictions Dr. Riopelle had imposed as no relevant evidence had been submitted.[9] There is no indication that the Office sought to clarify from Dr. Riopelle the current work restrictions or secure his opinion as to whether appellant could perform the selected position. The opinion provided by Dr. Riopelle in his October 28, 2009 report was that appellant could not perform the selected position.

As noted above, it is the Office's burden of proof to reduce compensation. The medical evidence as to work restrictions was not detailed and complete, and the limitation for reaching by Dr. Bernhoft appeared to be exceeded by the potential reaching required of the selected position. The only medical opinion of record as to the actual selected position was that appellant was unable to perform the job. The Board accordingly finds that the medical evidence was not sufficient to meet the Office's burden of proof in this case.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to reduce compensation based on the selected position of information clerk.

[9] The hearing representative stated he reviewed the 1993 claim case file and he reported that Dr. Riopelle had provided "restrictions" over a period from 2000 to 2007.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 14, 2009 is reversed.

Issued: November 1, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board